91-1640 (1)

Supreme Court, U.S.
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Case Number:

In the
UNITED STATES SUPREME COURT
OCTOBER TERM

Michael A. Nelson

Plaintiff-Appellant

Versus

U.S. Department of Justice

Defendant-Appellee

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted by:

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QUESTIONS FOR REVIEW

Whether appellant claims a cause of action for disclosure under Section 1806(f) of Foreign Intelligence Surveillance Act of 1978 (FISA), 50 USCS 1801 et seq., independent of any other rule or statute of the United States.

Whether appellant states his cause of action under statutes of the United States other than 50 USCS 1806(f).

PARTIES TO THE PROCEEDINGS

Pursuant to the Supreme Court Rule 14.1(b), the following is a list of all parties to the proceedings in the Eleventh Circuit:

1. Michael A. Nelson, Appellant-Plaintiff

2. United States Department of Justice, Appellee-Defendant

3. U.S. Attorney in Atlanta, Attorney for Appellee, (Daniel A. Caldwell, AUSA)

4. Honorable Emmett Cox, 11th Cir. Judge Member of oral argument panel

5. Honorable Frank Johnson, 11th Cir. Judge Member of oral argument panel

6. Honorable Thomas Reavley, 5th Cir. Judge* Member of oral argument panel

7. District court Judge Orinda D. Evans

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* Honorable Thomas M. Reavley, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

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*Statutes chiefly relied upon are marked by asterisks

REPORTS OF OPIONIONS DELIVERED IN THE CASE

Order of the United States Court of Appeals for the 11th Circuit dated 1/21/92, affirming the judgement of district court, contains unpublished opinion of the 11th Circuit delivered in the case. (App. at 1).

Order of the United States district court for Northern District of Georgia dismissing the case with prejudice, contains opinion of district court delivered in the case. (Appendix at 6).

STATEMENT OF JURISDICTION

Pursuant to 28 USCS Section 1254 this court has jurisdiction to review the appeal of the order of the United States Court of Appeals for the Eleventh Circuit entered on January 21, 1992 by writ of certiorari. Petition for rehearing was denied on March 4, 1992.

STATUTES, CONSTITUTION, ETC. APPENDIX

*Foreign Intelligence Surveillance Act of 1978 (FISA), 50 USCS 1801 et seq.; Sections 1801, 1804, 1805(a)-(d), 1806(a), 1806(f), 1806(g), 1809(a) & (c), 1810..... 13

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Civil Procedure Rule 8(f), **Construction of Pleadings:**

"All pleadings shall be construed as to do substantial justice.".

Civil Procedure Rule 12(b)(6), **Defense:**

"failure to state a claim upon which relief can be granted".

STATEMENT OF THE CASE

A. STATEMENT OF THE FACTS

In March and April of 1990 appellant, Nelson sent requests for information under Freedom Of Information Act (FOIA) and Privacy Act (PA), 5 USCS 552 and 552a, to defendant-appellee, DOJ for release of all the records pertaining to him which might exist in this department. DOJ refused to either confirm or deny the existence of certain information (FISA records) pertaining to appellant under statutory exemptions of the FOIA and under the terms of the FISA and Executive Order 12356.

1. DISTRICT COURT'S PROCEEDINGS - FACTS

a. On May 25, 1990 Nelson filed the complaint under the jurisdiction of Foreign Intelligence Surveillance Act of 1978 (FISA), 50 USCS 1801 et seq., in the district court for judicial review of FISA records and their subsequent release. By preponderance of evidence, Nelson

demonstrated in his complaint that he has become subjected to electronic surveillance under the Act since 1982. Nelson also alleged that through abuse of this unlawful surveillance he has constantly been conspired against and harassed. Because of this unlawful conduct of the government Constitutional rights and Civil Liberties of appellant have been violated and he and his family have been severly injured. Based on the claim of illegal electronic surveillance and his injuries which resulted from such course of conduct (cause of action), Nelson requested district court to disclose surveillance records to him under the provisions of the Act (50 USCS 1806(f) and (g)).

b. Thereafter, on August 10, 1990, DOJ, appellee, filed a motion to dismiss the complaint with prejudice. As grounds for such request DOJ falsely claimed that jurisdiction basis of complaint was the FOIA and the Privacy Act. Based on such

fradulent grounds DOJ contended that its response to Nelson's request under FOIA & PA was appropriate and that with that response defendant has discharged his duty. DOJ's motion which contains an affidavit signed under oath, contains false statements which misrepresent this action and conceal the material allegations and claims of complaint.

c. In his response to deny the DOJ's motion, Nelson controverted DOJ's affidavit by agency's bad faith and contrary evidence on record. Nelson elaborated on allegation of illegal electronic surveillance and his injuries resulting from such course of conduct, and demonstrated that this surveillance violated certain statutes of FISA such as: 1804(a)(4)(A) & (B), 1804(a)(7), 1805(a)(5), 1805(b)(2)(A) & (B), 1806(a), 1809, 1810. Based on his cause of action under these statutes, Nelson stated that pursuant to Section 1806(f) of the FISA, district court was required to

determine the legality of the surveillance and subsequently release the information to him. As an additional ground for disclosure, under authority of Section 1.6(f) of Executive Order (E.O.) 12356 and pursuant to allegation of illegal electronic surveillance Nelson contended that DOJ was required to declassify the FISA records pertaining to him. Nelson further stated that such declassification would make this information disclosable under FOIA & PA.

d. Acting in concert with defendant, district court per Judge Orinda D. Evans further misrepresented this action by acquiescing that the jurisdiction basis was the FOIA. She dismissed the complaint with prejudice for failure to state a claim under statutory exemption of FOIA (5 USCS 552(b)(1)(A)) and Fed.R.Civ.P. 12(b)(6).

2. COURT OF APPEALS' PROCEEDINGS - FACTS

a. On appeal to the 11th Circuit, Nelson filed a brief and requested that 11th Cir.

reverse the judgement of district court and require the government to stop the illegal surveillance and harassment of appellant. As grounds for these requests, he presented a detailed analysis of complaint, DOJ's pleadings and district court's order dismissing the complaint with prejudice.

Below are highlights of appellant's brief:

1). In analyzing the complaint appellant asserted that jurisdiction basis was the FISA and he alleged that his cause of action and claims for disclosure were under the FISA, not the FOIA as claimed by DOJ and district court. In addition, based on the allegation of illegal surveillance, Nelson demonstrated his cause of action under certain statutes of FISA, (1804(a)(4)(A) & (B), 1804(a)(7), 1805(a)(5), 1805(a)(3)(A) & (B), 1805(b)(3)(A) & (B), 1805(d), 1806(a), 1809, 1810). Based on his cause of action, Nelson further contended that complaint alleged a right for disclosure under 50 USCS 1806(f) & (g), separate from FOIA & PA which

required district court to determine the legality of the surveillance and release the surveillance records.

2). In analyzing DOJ's pleadings, Nelson demonstrated that Daniel A. Caldwell, Attorney for DOJ, acted in concert with district court Judge Orinda Evans. In order to provide grounds for Judge Evans to dismiss this action with prejudice, in his motion to dismiss the complaint, Attorney Caldwell intentionally misrepresented the jurisdiction basis, material allegations, and claims of complaint. Appellant further demonstrated that DOJ's motion to dismiss and other findings and conclusions were arbitrary, capricious, abuse of discretion, not in accordance with law and contrary to constitutional rights and previledges of appellant. (5 USCS 706(2)(A) and (B)). Based on this analysis, Nelson requested that in reviewing this action the 11th Circuit set aside DOJ's fact finding and conclusions.

3). In analyzing district court's order, Nelson demonstrated that 1) district court's dismissing the complaint was based on misrepresentation of jurisdiction basis, material allegations and claims of complaint, 2) per judge Orinda Evans district court acted in concert with Daniel Caldwell, Attorney for DOJ, abused her discretion, and committed reversible error. Appellant also reasserted his right for disclosure under 1806(f) & (g) of FISA which requires the district court to determine the legality of the electronic surveillance via respecting civil discovery or in camera review of FISA records (H.R. Rep. No. 1283, 95th Cong. 2d Sess. at 93, Para. 4) and subsequently release the information to appellant.

b. Appellee, DOJ in its brief filed in the 11th Cir., falsely claimed that jurisdiction basis of this action was FOIA and Privacy Act and repeated the same arguments that it presented in its motion to dismiss.

Appellee further claimed that scope of Section 1806(f) of FISA only encompasses the criminal proceedings and is not applicable to civil proceedings. (Appellee also made a similar claim in its reply brief filed in the district court in support of its motion to dismiss). Based on such grounds DOJ requested that the 11th Circuit affirm the order of district court.

c. In his reply brief, based on a detailed analysis of the text of Section 1806(f) of FISA, and Subsections 106(g) and (h) of H.R. Rep. No. 1283, 95th Cong. 2d Sess., appellant demonstrated that scope of 1806(f) encompasses both civil and criminal proceedings and that such claim of DOJ is based on distortion and misconstruction of law. Prior to this, in his brief, Nelson also presented a similar argument regarding the same issue which was raised in appellee's reply brief filed in the district court in support of its motion to dismiss. Pursuant to 5 USCS 706(2)(A) and (B),

appellant's reply brief requested that in reviewing this action the 11th Cir. set aside DOJ's fact finding and conclusions.

d. Pursuant to the oral arguments which were held on 12/10/91, on January 21, 1992, the panel of 3 judges of 11th Cir. entered an order affirming the judgement of district court. In arriving at such judgment, 11th circuit set aside fact finding and conclusions of DOJ and district court. This affirmance is based on the Eleventh Circuit's claim that Nelson alleges a cause of action under 50 USCS 1806(f) independent of any other rule or statute of the United States.

e. In his Petition for Rehearing filed in the 11th Circuit on 2/4/92, appellant articulately addressed the aformentioned claim of the 11th Cir. and demonstrated that such claim is contrary to evidence on record as a whole. Nelson further demonstrated that in compliance with the requirements of 1806(f), he has properly

stated his cause of action for disclosure pursuant to statutes of the United States other than Section 1806(f) of FISA.

f. In its order dated 3/4/92, 11th Circuit denied appellant's petition for rehearing. Also, on March 20, 1992, the Eleventh Circuit entered another order needlessly denying appellant's motion for stay of mandate pending petition for writ of certiorari.

B. JURISDICTION IN THE COURT OF FIRST INSTANCE (DISTRICT COURT)

Pursuant to 50 USCS 1806(f) & (g), which confer the jurisdiction to district court in such matters, district court had jurisdiction to entertain the complaint.

Pursuant to 28 USCS Section 1291, 11th Cir. had jurisdiction to hear appeals of the orders of district court.

SCOPE OF REVIEW

United States Court of Appeals for the Eleventh Circuit departed from the accepted

and usual course of judicial proceedings and sanctioned such a departure by district court. In addition, Eleventh Circuit has decided this action in a way that conflicts with applicable decisions of the United States Supreme Court. Rule 10.1(a) & (c).

Court should construe complaint in light most favorable to the plaintiff and accept allegations as true. Jenkins v. Mckeithen, 395 U.S. 411, 416-17. When a case is decided on a motion to dismiss, a rather detailed examination of the allegations of the complaint is necessary. Id. at 412.

Complaint is to be liberally construed in favor of plaintiff, Conley v. Gibson, 355 US 41, 2 L Ed 2d 80, 78 S Ct 99 (1957). The complaint should not be dismissed unless it appears that appellant could "prove no set of facts in support of his claim which would entitle him to relief". Id. at 45-46.

For the purpose of motion to dismiss, material allegations of the complaint are

taken as admitted. Walker Process Equipment, Inc. v Food Machinery, 382 US 172, 174-175, L Ed 2d 274, 249, 250, 86 S ct 346 (1965).

ARGUMENT AND CITATION OF AUTHORITIES

SUMMARY

Appellant's request for disclosure to district court was under jurisdiction basis of Foreign Intelligence Surveillance Act of 1978(FISA), 50 USCS 1801 et seq. (App 13-42). His request was also based on the allegation of illegal electronic surveillance and the injuries resulted from such course of conduct. This is one of the exact situations that 50 USCS 1806(f) is designed to address. In dismissing this action with prejudice, district court misrepresented jurisdiction basis, material allegations and claims of the complaint.

On appeal, in construing the complaint under FISA, the 11th Cir. misrepresented appellant's cause of action by claiming that

appellant alleges his cause of action under section 1806(f) of FISA independent of any other rule or statute of the United States. However, such claim is contrary to evidence on the record as a whole. Appellant did not allege any cause of action under 50 USCS 1806(f). Instead his cause of action was properly demonstrated under Sections 1804(a)(4)(A) & (B), 1804(a)(7), 1805(a)(5), 1805(a)(3)(A) & (B), 1805(b)(2)(A) & (B), 1805(d), 1806(a), 1809, 1810 of FISA, as well as Section 1.6(f) of E.O. 12356 and many other statutes of the United States.

Pursuant to such misrepresentation, the Eleventh Circuit contended that language of Section 1806(f) of FISA requires the cause of action be stated under any other rule or statute of the United States, and affirmed the judgment of district court. Eleventh Circuit further denied appellant's petition for rehearing wich demonstrated that such claim of the 11th Cir. was not supported by any evidence on the record.

Inasmuch as appellant was entitled to relief under FISA, order of the Eleventh Circuit affirming judgement of district court was unlawful and serves to deprive appellant of his rights and Due Process of Law.

ELEVENTH CIRCUIT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, SANCTIONED SUCH DEPARTURE BY DISTRICT COURT AND HAS DECIDED THIS ACTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THE UNITED STATES SUPREME COURT.

Because fact finding and legal conclusions of DOJ and district court have been addressed with particularity in appellant's brief and reply brief, and because in affirming the judgement of district court the 11th Cir. has set aside such erroneous finding and conclusions (App. at 3, footnote 1), no detailed analysis in regard to these documents is necessary. Instead the purpose is to articulately address the issues raised in the order of the 11th Cir. in order to demonstrate that affirmance of judgment of district court was

unlawful and that appellant was entitled to relief.

A. ELEVENTH CIR. SANCTIONED DISTRICT COURT'S DEPARTURE FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

In its order dated January 21, 1992, (App. 3), 11th Circuit stated: "Reasonably construing the Complaint as alleging a cause of action under the FOIA, the district court analyzed Nelson's request under applicable FOIA standards.". This statement of the 11th Cir. which refers to unlawful misrepresentation of district court as "Reasonably construing the complaint ...", is inappropriate.

Court should construe the complaint in light most favorable to plaintiff, Jenkins v McKeithen, 395 U.S. 411, 416-417. District court's construing the complaint under the FOIA was in light most unfavorable to plaintiff. It misrepresented jurisdiction basis of this action, concealed the material allegations and claims of complaint, and

provided grounds for district court to dismiss this action with prejudice, so that Nelson can not ever bring this action against the DOJ.

For the following reasons appellant states district court's misrepresenting the complaint was an intentional act:

1. Complaint at 1 clearly defines the jurisdiction basis as FISA.

2. In his pleadings filed in the district court, Nelson repeatedly asserted that jurisdiction is FISA not FOIA.

3. Nelson's allegations demonstrate injuries and states private cause of action for disclosure under FISA. However, the language of FOIA (5 USCS 552(a)(4)(B)) does not provide for private cause of action for disclosure, or injuries, or monetary damages, etc. Daniels v. St Louis VA Regional Office (1983, ED Mo) 961 F Supp 250. 5 USCS 552(a)(4)(B) in pertinent part states (App. at 46):

"On complaint, the district court ... has

jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.".

Based on language of this statute only when agency records are improperly withheld, plaintiff would have a cause of action under the FOIA. However, nowhere in the complaint has Nelson contended that under the FOIA agency has improperly withheld the information. Nowhere in the complaint has he alleged any cause of action under the FOIA or challenged the appropriateness of response of DOJ to his FOIA & PA request under the FOIA.

Furthermore, nowhere in the complaint has appellant requested district court "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld". This clearly shows that district court did not have the jurisdiction to construe the complaint under FOIA in the first instance.

Pursuant to a FOIA provision, 552(a)(4)(B) which confers jurisdiction on the Federal District Courts "to enjoin the agency withholding agency records and to order the production of any agency records improperly withheld," federal jurisdiction is dependent on a showing that an agency has (1) "improperly" (2) "withheld" (3) "agency records"; U.S. Dept. of Justice v. Tax Analysts, 492 U.S. 106 L Ed 2d 112, 117.

Nelson did not have and did not allege any cause of action for disclosure under the FOIA. Instead, based on the allegation of illegal electronic surveillance and his injuries caused by such course of conduct, he had and alleged a cause of action for disclosure under certain statutes set forth by FISA (other than 1806(f)). Because of these reasons, Nelson brought complaint to district court under FISA as opposed to FOIA. This clearly shows that district court could not have reasonably construed the complaint as alleging a cause of action

under the FOIA.

4. For the purpose of a motion to dismiss, the material allegations of the complaint are taken as admitted. Walker Process Equipment, Inc. v Food Machinery, 382 US 172, 174-175, L Ed 2d 274, 249, 250, 86 S ct 346 (1965). This shows that by law, district court was required to take the material allegations of complaint as admitted under the FISA, not under the FOIA. Nelson did not state any allegations under the FOIA. This clearly demonstrates that district court's construing complaint under FOIA was not reasonable as claimed by the 11th Circuit and conflicted with the applicable decision of the United States Supreme Court.

Based on the above reasons appellant states that in dismissing complaint district court departed from the accepted and usual course of judicial proceedings. Furthermore, the way district court decided appellant's complaint conflicts with applicable precedents of the United States

Supreme Court.

B. ELEVENTH CIRCIT'S JUDGMENT MISREPRESENTS APPELLANT'S CAUSE OF ACTION AND CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT.

On appeal to the 11th Circuit, appellant contended that jurisdiction basis of complaint is the FISA, not the FOIA as claimed by district court. Appellant also contended that pursuant to allegation of illegal electronic surveillance and the injuries resulting from such course of conduct (appellant's cause of action), complaint alleged a right for disclosure under 50 USCS 1806(f) & (g) (App. 37-39) separate from rights granted by FOIA & PA.

In reviewing the complaint under the Foreign Intelligence Surveillance Act, the Eleventh Circuit erroneously construed the aformentioned contention, as though appellant alleges his cause of action under Section 1806(f) of FISA independent of any other rule or statute of the United States.

For the purpose of motion to dismiss, material allegations of the complaint are taken as admitted. Walker Process Equipment, Inc. v Food Machinery, 382 US 172, 174-175, L Ed 2d 274, 249, 250, 86 S ct 346 (1965).

Based on such misrepresentation of Nelson's cause of action, on the grounds that language of 1806(f) of FISA requires the cause of action to be stated under any other rule or statute of the United States, 11th Circuit affirmed the judgment of district court. All pleadings shall be so construed as to do substantial justice. Fed.R.Civ.P. 8(f). Court should construe complaint in light most favorable to the plaintiff and accept allegations as true. Jenkins v McKeithen, 395 U.S. 411, 416-417.

50 USCS Section 1806(f) in pertinent part states (See App at 37 for entire text): "Whenever a court or other authority is notified pursuant to subsection (c) or (d) of this section, or whenever a motion is made pursuant to subsection (e) of this

section; or Whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States ... to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under this Act, the United States district court ... shall, not withstanding any other law, if the Attorney General files an affidavit under oath that discovery or an adversary hearing would harm the national security of the United States, review in camera and ex parte the application, order and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted.".

50 USCS 1806(f) (emphasis added).

Eleventh Circuit contends that: "Nelson claims the clause - Whenever a request is made by an aggrieved person pursuant to any other statute or rule of the United States - affords him an independent cause of action

for disclosure (App. at 5). Following such contention, the court states: "[A] request under this section must be made pursuant to ... [some] other statute or rule". Id. Court further contends: "Nelson maintains that he has a cause of action for disclosure based upon the above language, independent of any other statute or rule of the United States. The statute's language is plainly to the contrary.". (Id).

Based on the contentions of the 11th Cir., in defining the scope of the issues appellant notes that the only disputed issue is: "Whether appellant has stated his cause of action under Section 1806(f) of FISA, independent of any other statute or rule of the United States.". Appellant further notes that the above contentions of the court which are the sole reason for affirming district court's order, are contrary to evidence on record as a whole.

Nowhere in the complaint, pleadings, or briefs that appellant has filed in the

district court or 11th Circuit does he claim or maintain that he has a cause of action under Section 1806(f) separate from any other statute or rule of the United States. Nowhere in these documents does Nelson claim that the language of 1806(f) affords him an independent cause of action for disclosure. On the contrary, in compliance with the requirements of Section 1806(f), appellant in fact, HAS stated his cause of action pursuant to other rules or statutes of the United States. The complaint should not be dismissed unless it appears that appellant could "prove no set of facts in support of his claim which would entitle him to relief.". Conley v. Gibson, supra, at 45-46 2 L Ed 2d at 84. See also Jenkins v McKeithen, 395 US 411, 417.

The above statements of the 11th Circuit are very general and do not provide any detailed information to show which contention or allegation of complaint or pleadings was basis for 11th circuit's

arrival at such conclusion. When a case is decided on a motion to dismiss, a rather detailed examination of the allegations of the complaint is necessary. Jenkins v. McKeithen, 395 U.S. 411, 412.

C. APPELLANT'S CAUSE OF ACTION AND STANDING TO SUE WERE IN ACCORD WITH PRECEDENTS OF THE SUPREME COURT.

The aformentioned contention of the 11th Circuit misrepresents Nelson's cause of action and challenges his standing to sue. When standing to sue is placed at issue in a case, the question is whether the person whose standing is challenged is proper party to request an adjudication of a particular issue, that is, whether there is a logical nexus between the status asserted and the claim sought to be adjudicated. Jenkins v McKeithen at 411.

Complaint alleged that Nelson has become subjected to electronic surveillance which has been unlawfuly authorized and conducted and has caused him injuries.

Based on the allegation of illegal surveillance, plaintiff claimed that under provisions of FISA he has a cause of action for disclosure and that district court should determine the legality of surveillance and subsequently release the surveillance logs to him (50 USCS 1806(f) & (g)). This clearly shows that as the first step in establishing his standing to sue Nelson has created the logical nexus between his status and claim sought to be adjudicated.

With regard to standing to sue, Nelson also notes that; the plaintiff must further claim that the injury to him, or those whom he has status to represent, results from the particular course of conduct that he challenges. See Jenkings v McKeithen, at 411. Furthermore, there must be some connection between official action challenged and some legally protected interest of the party challenging the action. Flast v Cohen, Supra, at 101-106,

20 L Ed 2d at 962-965. In his complaint and pleadings, Nelson has stated that pursuant to a conspiracy certain officials have subjected him to electronic surveillance under the FISA in order to harass him, to violate his Constitutional/Civil rights, and cause him injuries. Foreign Intelligence Surveillance Act was enacted to establish procedures for use of electronic surveillance in gathering foreign intelligence information, it was to strike sound balance between need for such surveillance and protection of Civil liberties. Re Kevork (1986, CA9 Cal) 788 F2d 566. Furthermore, Nelson presented numerous examples of such unlawful conduct and his injuries.

By unlawfully authorizing & conducting the alleged electronic surveillance, government violated certain statutes of FISA and legally protected rights of appellant, and caused him injuiries. This shows that as a minimum appellant had a cause of action

under those FISA statutes which were violated by these officials. Furthermore, because he demonstrated his injuries were caused by such course of conduct (illegal electronic surveillance & harassment), he properly asserted his standing to sue.

Moreover, under the teaching of Jenkins v McKeithen, at 412, appellant also notes that under certain circumstances, a plaintiff's standing to sue may be affected by an "adjudicative constitutional rights" statement of this court. A person under investigation by district attorney does not have a constitutional right that the investigations be conducted in secrecy, or that the official keep his plans to prosecute confidential.". Id. For the following reasons appellant states that adjudicative statement of this court is not applicable to appellant's case:

1. This opinion of the Supreme Court only refers to [lawful] investigation. There is simply no indication in this statement that

the scope of the court's opinion encompasses the "illegal investigation" too. When a law-abiding prosecutor for good cause subjects a criminal or suspected criminal to investigation it is quite understandable that such person should not have a constitutional right for the investigation to be conducted in secrecy. However, in case of this appellant the senario is quite different. Appellant has become subjected to electronic surveillance which has been a) unlawfully requested (Applicant, 50 USCS 1804(a)), committed Perjury), b) unlawfully authorized & extended (orders of the Foreign Intelligence Surveillance Court are clearly erroneous (50 USCS 1805(a)(5) & 1805(d)) and based on conspiracy with the Applicant), and c) unlawfully conducted (by certain CIA members who committed serious crimes).

2. As the Honorable Justices of this court may note, appellant has knowledge of details of such surveillance. Secrecy has never been an issue in this illegal surveillance.

When the illegal elctronic surveillance is already known to the aggreived person (50 USCS 1801(k)), attempt to maintain the secrecy of the investigation would serve no purpose other than obstruction of justice.

Secrecy should be maintained only when surveillance is lawful. In Alderman v. United States, (394 U.S. 165), Alderman decision, Supreme Court held that once the aggrieved person established the illegality of the electronic surveillance and his standing to oppose, he must be given unlawful surveillance files. Supreme court further upheld the validity of its decision in Keith decision, United States v. United States district court, (407 U.S. 297, 32 L.Ed.2d 752). Therefore, to further deprive a person who has become subjected to unlawful surveillance from his Constitutional rights is unlawful and clearly in violation of Amendments [V] and [VIII] of the Constitution of the U.S.

3. In the documents that appellant filed in

the district court and the Eleventh Circuit beyond all doubts he proved that his electronic surveillance has been unlawfully authorized and conducted. In his pleadings appellant also demonstrated that:

a. By swearing to a fraudulent application in the U.S. Foreign Intelligence Surveillance Court (FISC), (See 50 USCS 1805, App. at 30) the federal officer (Applicant) who has subjected appellant to electronic surveillance (See 50 USCS 1804, App. at 25) has committed purjury (18 USCS 1621).

b. Certain members of the FISC acting in concert with this federal officer (possibly a Member of Congress from Georgia, et al.) have authorized and extended (50 USCS 1805) the illegal surveillance for almost a decade.

c. Certain members of the CIA who have been assigned to conduct such unlawful surveillance under supervision of Applicant have savagely harassed appellant, have violated his Constitutional/Civil rights on a daily basis (App. 48) and have robbed him

of what he had and what he could have gained in the past decade. As one consequence of such unlawful conduct on two occasions, appellant has lost his job and due to the relentless harassment and interferences of the CIA in his life, is unable to secure proper employment. Despite his outstanding education, very marketable expertise, unique experience and background, appellant has been unemployed for over two years. As another part of such unlawful conduct appellant has been threatened in various ways, has become targets of dog attacks and car accidents which have caused him serious spinal injuries and knee injury which requires surgery. There are simply no laws in this country which would allow for such criminal conduct and would allow a person under investigation to be so brutally harassed and injured.

d. Applicant and certain members of the FISC have subjected appellant to uninterrupted telephone, mail, home, places of employment,

and activity surveillance. Furthermore, the CIA has conducted such surveillance and harassment of appellant on an extremely large scale by employing numerous helicopters, radars, laser communicators, audio and video transmitter (bugs), wire taps, mail cover, surveillance teams, and other sophisticated and elaborate tools. By authorizing and conducting such illegal operation, the aformentioned federal officer and certain members of the FISC and the CIA have shattered appellant's life, have abused public trust, have wasted hundreds of millions of dollars of taxpayers' money, and have committed serious crimes.

e. On 1/7/92, appellant filed a complaint with the Judicial Council of the 11th Circuit for judicial misconduct of district court Judge Orinda D. Evans who unlawfully dismissed his lawsuits in district court. In his complaint and other pleadings, based on undeniable facts drawn from the records, appellant has demonstrated that while his

lawsuits[1] were pending in district court, Judge Evans engaged in a conspiracy with the defendants, Applicant, and possibly certain members of FISC in order to injure Nelson.

Complaint for judicial misconduct further demonstrates that conduct of judge Evans was unconstitutional and in violation of 18 USCS Section 241, 1001, 1505 and 42 USCS Section 1985(2) & (3) (App. 49). Based on such allegations, complainant requested that the Judicial Council dismiss Judge Evans from her duties and recommend her for impeachment to the Judicial Conference of the United States. Prior to this, based on similar grounds appellant had filed a motion with the 11th Cir. requesting that Daniel A.

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[1] In 1990 appellant also filed three other lawsuits in the distirct court; Nelson v Senator Sam Nunn's Office, No. 1:90-CV-1406 ND Ga; Nelson v Senator Wyche Fowler's Office, No. 1:90-CV-1465, ND Ga; and Nelson v. Congressman Richard Ray's Office, No. 1:90-CV-1122. In their motions to dismiss the complaints, Offices of Nunn and Fowler acted in concert with Judge Evans and DOJ and falsely claimed that jurisdiction of this action is the FOIA as opposed to FISA.

Caldwell, attorney for DOJ be suspended, disbarred, or in the alternative be disbarred from further representation of DOJ on this action.

Based on the reasons set forth above, appellant states that his cause of action and standing to sue are in accord with the precedents of this court. Therefore, appellant's standing to sue should not be disturbed by the existing illegal electronic surveillance or by those who requested, authorized, or conducted this criminal course of conduct. For the purpose of a motion to dismiss, material allegations of the complaint are taken as admitted. Walker Process Equipment, Inc. v Food Machinery, 382 US 172, 174-175, L Ed 2d 274, 249, 250, 86 S ct 346 (1965).

D. ELEVENTH CIRCUIT'S CLAIM THAT APPELLANT'S CAUSE OF ACTION IS ALLEGED UNDER 50 USCS 1806(f) IS CLEARLY ERRONEOUS.

Because of the following reasons appellant states that 11th Circuit's claim

that Nelson alleges his cause of action under Section 1806(f) of FISA independent of any other statute or rule of the United States, is clearly erroneous:

Complaint at 1 states the jurisdiction basis under 50 USCS 1801-1811.

Complaint (Para. 8-37) alleges that pursuant to a conspiracy Nelson has become subjected to electronic surveillance under the FISA. In defining his cause of action, Nelson demonstrates the existence of an electronic surveillance which is geared toward Nelson's harassment as opposed to obtaining foreign intelligence information (50 USCS 1801(e)). By presenting numerous examples complaint also alleges that information obtained regarding Nelson's private life has been unlawfully disseminated and exploited in various ways against him. Pursuant to certain statutes set forth by FISA, such showing demonstrates that this electronic surveillance was unlawfully authorized and conducted.

Complaint further presents evidence which proves that pursuant to this illegal surveillance Nelson and his family have been severely injured. In the conclusion of his complaint Nelson states:

"By virtue of the foregoing and considering the fact plaintiff has never been a foreign power (50 USCS 1801(a)) or an agent of a foreign power (50 USCS 1801(b) (App. at 13) ... it is evident that these sorts of activities and electronic surveillance have not been lawfully authorized nor lawfully conducted.".

Based on the arguments and exhibits that Nelson has presented in the complaint and Response of plaintiff to DOJ's motion to dismiss, he has demonstrated that this electronic surveillance has been unlawfully requested, authorized and conducted and has violated provisions of 50 USCS 1804(a)(4)(A) & (B), 1804(a)(7), 1805(a)(5), 1805(a)(3)(A) & (B), (1805(b)(2)(A) & (B), 1805(d), 1806(a). Nelson's complaint and other pleadings show

that government's violation of each of these statutes has caused him certain injuries. This demonstrates that under any of these statutes Nelson stated a cause of action.

As defined in 50 USCS 1809(a) & (c), Criminal sanctions, (App. 39-40) such violations are criminal offense. Pursuant to these statutes Nelson had a cause of action to request district court to disclose the surveillance (1806(f) & (g)), so that this criminal conduct can be stopped. Also, based on such violations, Nelson had a cause of action under 50 USCS 1810 (App. 40-41) against any person who has committed such violation and is entitled to recover actual and punitive damages, and reasonable attorney's fees and other investigation and litigation costs. Furthermore, provisions of Section 1810 of FISA require the court to force the Government to prove the legality of surveillance, 1806(f). (See H.R. Rep. No. 1283, 95th Cong., 2d Sess., Section 110, at 98) (App. 42, 44).

Some of the violations of statutes of FISA were also addressed in plaintiff's response to deny DOJ's motion to dismiss in District Court and in appellant's brief in Court of Appeals. Based on his cause of action which was established under above statutes of the FISA, and many other statutes (See Section "F" below), Nelson requested the district court to disclose the surveillance logs to him under provisions of the Act, 50 USCS 1806(f) & (g).

As demonstrated above, complaint states Nelson's cause of action based on allegation of illegal electronic surveillance and his injuries caused by such course of conduct. Additionally, it is interesting to note that at one point the order of Eleventh Circuit confirms Nelson's cause of action as defined above by rephrasing certain facts of complaint. In its order the Eleventh Circuit states: "In the district court Nelson alleged that for the past eight years he and his family have been subjected to

electronic surveillance as part of a government conspiracy established to harass him, causing him, among other things, great emotional distress." (App. 1-2).

To elaborate on this statement of 11th Circuit, appellant notes that under provisions of FISA defined in 50 USCS 1806(f) & (g), a surveillance may only be considered illegal if it is unlawfully authorized and/or conducted. Thus the illegality of a surveillance may only be determined based on government's violation of those FISA procedures which deal with the authorization and/or conducting of an electronic surveillance (e.g. 1804(a)(4)(A) & (B), 1804(a)(7), 1805(a)(5), 1805(a)(3)(A) & (B), 1805(b)(2)(A) & (B), 1805(d), 1806(a), 1809, 1810) NOT based on 1806(f) which deals with determination of illegality of surveillance by district court. Furthermore, if in the course of conduct of such unlawful surveillance the government causes injuries to the aggrieved person,

that person will have a cause of action under any or all of these statutes to request the district court to determine the illegality of the surveillance (1806(f)) and disclose the surveillance logs (1806(g)).

This clearly shows that Nelson properly claimed his cause of action under statutes of FISA other than Section 1806(f). This also shows that by restating certain facts of the complaint, in its order the 11th Circuit acknowledged that appellant properly stated his cause of action. Despite such acknowledgement, at the conclusion of its order the 11th Cir. turned around and fictitiously claimed that Nelson alleges his cause of action under 50 USCS 1806(f) independent of any other rule or statute of the U.S. All pleadings shall be so construed as to do substantial justice. Fed.R.Civ.P. 8(f).

For the purpose of motion to dismiss, material allegations of the complaint are taken as admitted. Walker Process

Equipment, Inc. v Food Machinery, 382 US 172, 174-175, L Ed 2d 274, 249, 250, 86 S ct 346 (1965). The complaint should not be dismissed unless it appears that appellant could "prove no set of facts in support of his claim which would entitle him to relief.". Conley v Gibson, supra, at 45-46 2 L Ed 2d at 84. See also Jenkins v McKeithen, 395 US 411, 417.

E. ELEVENTH CIRCUIT'S MISREPRESENTATION OF NELSON'S CAUSE OF ACTION WAS AN INTENTIONAL ENDEAVOR DESIGNED TO DISMISS THE COMPLAINT WITH PREJUDICE.

For the following reasons appellant states that 11th Cir.'s misrepresentation of Nelson's cause of action (as demonstrated in the body of this petition) was an intentional effort designed to dismiss this action with prejudice:

1. On 12/3/91, a week prior to the oral arguments of this action, appellant filed a motion for recusal of Judge Frank Johnson and Judge Thomas Reavley, members of the oral

argument panel. As grounds for this motion, appellant demonstrated the probability of an orchestrated effort designed to dismiss appellant's lawsuits in the Court of Appeals. Appellant further provided evidence that reasonably questioned the impartiality of these members. Moreover, based on the following cases, appellant requested that these judges disqualify themselves from this case under 28 USCS 455(a) (App. at 47).

Recusal is required under 28 USCS 455(a), even though federal judge lacks actual knowledge of fact indicating judge's interest or bias in case. Liljeberg v. Health Services Acquisition Corp., (1988, US) 100 L Ed 2d 855, 108 S Ct 2194, 11 FR Serv 3d 433. Goal of 28 USCS 455(a) is to foster appearance of impartiality, and any question of judge's impartiality threatens purity of judicial process; since statute focuses on appearance of impartiality, as opposed to existence in fact of bias or

prejudice, judges faced with this potential ground for disqualification ought to consider how their participation in given case looks to average man on street. Potashnick v Port City Constr. Co. (1980, CAS Ala) 609 F.2d 1101.

Standard under 28 USCS 455(a) is objective and is what reasonable person knowing all relevant facts would think about impartiality of judge; judge's introspective estimate of his own ability to hear the case impartially is no longer relevant, and even where question is close, judge must recuse himself from trial. Roberts v. Bailar(1980 CA6 Tenn) 625 F.2d 125

However, despite the requirements of 28 USCS 455(a) and the above precedents, the aformentioned judges denied Nelsons' motion and took part in the oral arguments and unlawfully affirmed lower court's decisision.

2. In his petition for rehearing, by referring to various pages in his complaint and previous briefs, appellant demonstrated

that he has stated his cause of action under statute of FISA, etc. other than 50 USCS 1806(f). Appellant further demonstrated that Eleventh Circuit's claim that Nelson alleges his cause of action under Section 1806(f) of FISA independent of any other rule or statute of the United States was contrary to evidence on record as a whole.

3. Despite the fact that appellant's petition for rehearing very clearly showed that appellant has properly stated his cause of action, in its order dated 3/4/92 Eleventh Circuit denied this petition (App. at 12). Such conduct of the Eleventh Circuit is nothing less than departure from accepted and usual course of judicial proceedings.

F. ADDITIONAL CAUSE OF ACTION UNDER SECTION 1.6(F) OF EXECUTIVE ORDER 12356 AND OTHER STATUTES.

As an additional cause of action, in his response to deny DOJ's motion to dismiss, and in his brief filed in the Court

of Appeals, based on allegation of illegal electronic surveillance and violation of certain statutes of the FISA, Nelson demonstrated another cause of action under Section 1.6(a) of Executive Order (E.O.) 12356. Section 1.6(a) of E.O. 12356 in pertinent part states: "In no case shall information be classified in order to conceal violations of law". Because appellant's electronic surveillance has been unlawfully authorized and conducted, based on the authority of this Order the FISA records pertaining to Nelson should be declassified, so that the violation of law will not be concealed and justice will not be obstructed. In addition, this would have made such unclassified information disclosable even under FOIA/PA. This clearly demonstrates that Nelson also alleged a cause of action for disclosure under the authority of E.O. 12356 (App. at 44).

The basic purpose of the FOIA is to ensure an informed citizenry, vital to the

functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed. NLRB v Robbins Tire & Rubber Co, 437 US 214, 242.

In addition Nelson's allegations as defined in the complaint and his other pleadings demonstrate injuries (cause of action) under the Constitution and certain other statutes of the United States including:

1. Nelson demonstrated countless violations of his Constitutional rights, including violations of his a) Right to privacy, b) Right to freedom of association, c) Right to be free from unreasonable searches and seizures, d) Right to freedom of speech, e) Right to Due Process of Law, f) Right to petition the government for a redress of grievance, g) Right to vote, h) Right to be free from involuntary servitude, i) Right to life and liberty, j) Right to equal protection of law, k) Right to free exercise of religion.

2. Civil action for deprivation of rights, 42 USCS Section 1983 (App. at 54).

3. Conspiracy to interfere with civil rights, 42 USCS Sec. 1985(2) & (3), (App 56)

4. Conspiracy against rights, 18 USCS Section 241 (App. at 48).

5. Deprivation of rights under color of law, 18 USCS Section 242 (App. 48-49).

6. Federally protected activities 18 USCS Section 245(b)(2)(C) (App. 49-50)

7. Obstruction of persons in the free excercise of religious beliefs, 18 USCS Section 247(a)(2) (App. 50-51).

6. Perjury 18 USCS Section 1621 (App. 53-54)

G. APPELLANT WAS ENTITLED TO RELIEF

Based on the following reasons appellant states that he was entitled to have access to surveillance records pertaining to him:

As demonstrated above, Nelson stated his cause of action for disclosure under statutes of FISA (other than 1806(f)), E.O. 12356, Constitution, and many other

statutes of the United States. Pursuant to any or all of these statutes and under the provisions of 50 USCS 1806(f), district court was required to determine the illegality of the electronic surveillance.

Furthermore, because Attorney General did not certify under oath that adversary hearing would harm the national security of the United States (50 USCS 1806(f)), district court was also required to determine the illegality of electronic surveillance via respecting civil discovery as opposed to in camera review of FISA records. Subsection 106(f) of H.R. Rep. No. 1283 95th Cong., 2d Sess., 93 in pertinent part states (App. at 41-44):

"A decision of illegality may not always arise in the context of suppression; rather it may, for example, arise incident to a discovery motion in a civil trial. Here, again, the bill does not specify what the court should order. Again, the court, should grant the motion only 'in accordance

with requirements of law.' Here, however, the requirements of law would be those respecting civil discovery. In other words, once the surveillance is determined to be unlawful, the intent of this section is to leave to otherwise existing law the resolution of what, if anything, is to be disclosed.".

However, such determination would have required the district court to release the FISA records pertaining to Nelson under Section 1806(g) of the Act (App. at 40). In Alderman decision, Alderman v United States, 395 U.S. 165, the U.S. Supreme Court held that once the aggrieved person established the illegality of electronic surveillance and his standing to oppose, he must be given the unlawful surveillance documents. The Supreme court confirmed the validity of its decision in Keith decision, United States v. U.S. District Court, 407 U.S. 297.

Moreover, determination of illegality of surveillance by district court, would

have required the DOJ to declassify the FISA records pertaining to Nelson under the authority of Section 1.6(f) of E. O. 12356. Therefore, such unclassified information would have been disclosable even under the FOIA and the Privacy Act, 5 USCS 552 & 552a.

CONCLUSION

Based on the reasons set forth above, appellant states that based on misrepresentation of jurisdiction basis, material allegations, and claims of the complaint district court dismissed the case with prejudice under the FOIA. On appeal, in reviewing this action under jurisdiction of the Foreign Intelligence Surveillance Act, 50 USCS 1801-1811, the Eleventh Circuit misrepresented complaint's cause of action by claiming that appellant states his cause of action under 50 USCS 1806(f). Inasmuch as appellant stated his cause of action under statutes of the United States other

than 50 USCS 1806(f) and his standing to sue was established in accord with the applicable precedents of the United States Supreme Court, Eleventh Circuit's affirming the judgment of district court was unlawful and deprived appellant of due process of law.

Furthermore, in arriving at such judgment, the Eleventh Circuit departed from the accepted and usual course of judicial proceedings and sanctioned such departure by district court. In addition, Eleventh Circuit has decided this action in a way that conflicts with applicable decisions of the United States Supreme Court.

Wherefore, it is appropriate that the court grant appellant's Writ of Certiorari and review this action for an exercise of court's power of supervision and settlement.

Respectfully submitted:

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In the
UNITED STATES SUPREME COURT
OCTOBER TERM

Michael A. Nelson

Plaintiff-Appellant

Versus

U.S. Department of Justice

Defendant-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 1992, 3 copies of the Appellant's Petition for Writ of Certiorari was served by first class mail on:

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